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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946

No. 497

149 MADISON AVENUE CORP., and WILLIAMS & CO., INC.,
Petitioners,

*against*

FRANK ASSELTA, CAMILO DEL RIO, JOSEPH McARDLE, SAMUEL MANNE, CORNELIUS McCOLE, BURTON PETERSON, FRANK RODRIGUEZ, JAMES TORRA, JOHN H. BERGER and GEORGE BERGER,
Respondents.

**MOTION OF**

**128 West 30th Street Corp.**
**Eleven Fifteen Realty Corp.**
**Richfil Estates, Inc.**
**Mangeorge Realty Corp.**
**Two Fifty Three Realty Corp.**
**Mathilda D. McCullough and Lillian Kaster**
**Thelma Savada, Betty Kaufman, Jean F. Ruth, Helen Rosenthal**
**Millinery Combination, Inc.**
**Hurry Realty Corp.**
**Seven Thirty Eight Realty Corporation**
**15 West 39th Street, Inc.**
**Manlev Realty Corp., Bernie Bernstein, Charles Rothenberg, Grace Rothenberg, David Levin, Dan W. Barker, Emanuel Schlossman, Saul Schlossman, Carl Walberg,**

**FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*.**

MURRAY I. GURFEIN,
*Counsel for the Above-named Movants, as Amici Curiae.*

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Respondents.

## MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

MAY IT PLEASE THE COURT

The undersigned, as counsel for the movants named below, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amici curiae*.

MURRAY I. GURFEIN,
Counsel for:

128 West 30th Street Corp.,
Eleven Fifteen Realty Corp.,
Richfil Estates, Inc.,
Mangeorge Realty Corp.,
Two Fifty Three Realty Corp.,
Mathilda D. McCullough and Lillian Kaster,
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*Amici Curiae.*

## Statement of *Amicus Curiae* Position

The movants are twenty-four owners or operators of real estate in New York City. Each of them is a defendant in one or more of the following cases, all pending in the United States District Court for the Southern District of New York:

*Berbeck, et al.* v. *128 West 30th Street Corp., et al.* Civil No. 37-659;

*Borg, etc.* v. *Eleven Fifteen Realty Corp., et al.* Civil No. 38-705;

*Bredstrand, etc.* v. *29-35 West 32nd Street Corporation, et al.* Civil No. 39-289;

*Gonzales, et al.* v. *Adams & Co. Real Estate, Inc., et al.* Civil No. 36-339;

*Jordan, et al.* v. *New York Life Insurance Company, et al.* Civil No. 37-171;

*Marino, etc.* v. *Coleman Holding Corp., et al.* Civil No. 38-754;

*Moore, et al.* v. *Adams & Co. Real Estate, Inc., et al.* Civil No. 36-439;

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*Pellittiri, et al.* v. *Adams & Co. Real Estate, Inc., et al.* Civil No. 36-120;

*Rennar, etc.* v. *Hurry Realty Corp., et al.* Civil No. 39-526;
*Richardson, etc.* v. *Seven Thirty Eight Realty Corporation, et al.* Civil No. 38-756;
*Sutherland, et al.* v. *Adams & Co. Real Estate, Inc., et al.* Civil No. 38-356;
*Walsh, et al.* v. *Adams & Co. Real Estate, Inc., et al.* Civil No. 37-32;
*Pyke, etc.* v. *Ploger, et al.* Civil No. 39-524.

As such owners or operators they signed contracts with Local 32B of the Building Service Employees International Union on the form which emerged from the recommendation of the National War Labor Board in 1942 (Pl. Ex. 1; Pl. Ex. 4, pp. 3, 33-34, 70-72). Their contract is precisely the same as the contract, the validity of which is challenged, in the case at bar.

They and about 700 owners similarly situated understood that this agreement complied with the Fair Labor Standards Act. ~~They~~ It ~~were~~ was accepted by a strong labor union; ~~they~~ it bore the imprimatur of a government agency —the National War Labor Board. The movants participated in no negotiations, which is also true of the defendants 149 Madison Ave. Corp. and Williams & Co. in the present case. Thus, neither the movants nor the defendants in this case could have had any *actual* intent to "circumvent the statute" (C. C. A. op., R., p. 83) by the intentional manipulation of words.

The movants paid substantial wage increases at the time they signed the agreement, more than required by the application of the Fair Labor Standards Act. They in no sense preserved the pre-statutory wage scale. Payrolls were computed on an hourly basis. The Wages & Hours Administration has not hitherto challenged the formula or the modes of payment. They, nevertheless, now find that they are subjected to suits for double liability from Septem-

ber 1942 to September 1945 on agreements with which the Circuit Court of Appeals "might otherwise agree" if it were not for an "intent to circumvent the statute". Because the decision herein may be determinative of the situation of the movants, the motion has been made to file this brief as *amici curiae*.

The petitioners herein have consented in writing to the filing of this brief as *amici curiae*. The respondents have stated in writing that, while they do not consent, they do not oppose this application for permission so to file.

Respectfully submitted,

MURRAY I. GURFEIN,
*Counsel for Above-named Movants.*

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Respondents.

## BRIEF FOR *AMICI CURIAE*

### Opinions Below

The opinion of the District Court (R. 184-203) is reported at 65 Fed. Supp. 385. The opinion of the Circuit Court of Appeals (R. pp. 81-85) is reported in 156 F. (2d) 139.

### Jurisdiction

The judgment of the Circuit Court of Appeals was entered on June 17, 1946 (R. p. 84). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial

Code as amended by the Act of February 13, 1925. The petition for a writ of certiorari was filed on September 13, 1946 and granted after petition for rehearing on December 9, 1946.

## Questions Presented

The master agreement was applicable to loft buildings, as well as other buildings pursuant to a Directive Order of the National War Labor Board. The parties understood that the loft buildings were to be covered by the Fair Labor Standards Act. The contract provided for a regular workweek for most building service employees of 46 hours per week, provided "minimum weekly wages" and contained a formula to determine the regular hourly rate of each employee as follows:

> "Hourly rates for those regularly employed more than 40 hours per week shall be determined by dividing their weekly earnings by the number of hours employed plus one-half the number of hours actually employed in excess of 40 hours."

The hourly rate was a constant rate. Payroll sheets were made on an hourly basis with time and a half shown for hours above 40, which the employees accepted.

The ultimate question presented is whether the hourly rates paid under the formula were the regular rates for purposes of overtime under Section 7(a) of the Fair Labor Standards Act of 1938. The subsidiary questions are:

(1) Did the agreement at bar provide for agreed weekly earnings (take home pay) inclusive of overtime compensation?

(2) Where the parties agree on a regular workweek with agreed weekly earnings (take home pay) inclusive of overtime compensation, with an hourly

rate derived therefrom, is there any legal compulsion to apply the *Missel* formula (wage divided by hours equals rate, 316 U. S. 572, 580)?

(3) Where the total compensation for a regular workweek is higher than would have been required through an application of the Fair Labor Standards Act to the previous weekly rate, has not the statutory purpose been carried out?

(4) Is there any legal difference under the Fair Labor Standards Act between an expressed hourly rate and an hourly rate derived arithmetically by the formula?

## Statute Involved

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. 6, Section 201, *et seq.*) are as follows:

"Sec. 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

* * * * * * *

(3) For a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which he is employed."

## Statement

The *amici curiae* herein adopt the statement of facts in Appellants' Brief (Appellants' Brief, pp. 4, through 17), except as reference may be made to the record herein to avoid burdening the Court with repetition.

## Specification of Errors

The Court below erred

(1) in holding that the hourly rates computed under the formula of the National War Labor Board Agreement were not the regular hourly rates for purposes of overtime under Section 7(a) of the act;

(2) in holding that the Respondents were entitled to overtime, liquidated damages of equal amount, attorneys' fees and costs under Section 16(b) of the Act.

## Summary of Argument

The weekly minimum wages fixed in the agreement were intended to be take home pay inclusive of overtime compensation. They were not a weekly rate of pay for a variable workweek. The weekly minimum wage referred to a regular workweek with a fixed number of hours. This was not a case where a weekly wage was set with no limit imposed upon the number of hours the employee would be required to work for the weekly wage. Thus, an hourly rate for the non-overtime hours could be derived from the weekly figure.

The formula was the only mathematical method for determining such hourly rate for non-overtime hours.

Since there was, in fact, an hourly rate determined by the formula applied by the parties, the Courts below were in error in concluding that there were fixed weekly rates of compensation. The conclusion was erroneous as a matter of law. It is supported by no evidence as a matter of fact.

Under the decisions of this Court parties may by contract provide that a weekly figure include additional com-

pensation for overtime. In such case the *Missel* formula is not applicable.

That the hourly rate in this contract was derived from a weekly take home figure does not make the hourly rate any less regular than if it had been expressed. The difference is merely one of form and reaches the same result.

In this case substantial increases in take home pay were given to the building service employees in the contract at issue. The increases were more than would have been required by the imposition of a 50% premium for overtime applied to the old rate of weekly pay of the preceding Sloan Agreement. The employers have thus paid more than 150% for hours above the statutory workweek. The statutory policy has thus been fully complied with.

To prohibit the procedures of this agreement would be to limit the field of collective bargaining. Take home pay is often the primary union consideration, and a fixed workweek above the statutory workweek is of benefit to the employees.

## ARGUMENT

**The Hourly Rates under the Formula of the Agreement were the "Regular Rates" under Section 7 of the Fair Labor Standards Act.**

***A. The weekly minimum wage in the agreement was "take home pay" inclusive of overtime for a regular workweek and not a weekly rate of pay for a variable workweek. This interpretation is compelled by the formula for hourly rate and by the course of dealing of the parties.***

The National War Labor Board Agreement referred to both a "weekly minimum wage" for a regular workweek, and to a formula for determining the *hourly* rate (Pl.

Ex. 1). The formula read:

> "The hourly rates for those regularly employed more than forty (40) hours per week shall be determined by dividing their weekly earnings by the number of hours employed plus one-half of the number of hours actually employed in excess of forty (40) hours."

The hourly rate was a *constant* rate determined by the formula on the basis of a regular workweek. The weekly figure was an index of reference for the hourly rate to be derived by formula. It was a figure that included the overtime properly compensated within the regular workweek. It was never a weekly rate of pay for a workweek of varying length nor was it a weekly rate of pay for a regular workweek *exclusive* of overtime. That it was at all times referable to an hourly rate is demonstrable in this case.

No weekly figure was arrived at in this case without *simultaneous* agreement upon the *hourly* rate to be fixed by formula. This can be demonstrated with mathematical precision. *Before* the National War Labor Board hearings there had been no agreement between the parties as to wages or hours. During the National War Labor Board hearings there was discussion of the formula (already contained in the *Meyer* Agreement in the same industry), *before* any recommendation had been made by the Panel (Pl. Ex. 4, pp. 33-34). When the Panel recommended the weekly figure, it was not yet the subject of an agreement of the parties—no meeting of the minds on wages had yet occurred. The Panel specifically said so in langauge the lower courts failed to quote:

> "It was understood *at the hearing* that if the Board set hours for offices and lofts above the 40-hour maximum demanded by the union, the parties would adopt the formulae of the Meyer Agreement for the calcu-

lation of hourly rates, and the fixing of overtime. These formulae were introduced because of the prospective application of the Fair Labor Standards Act. We quote and explain them in Appendix B. As they have been accepted in principle by the parties we believe they should be incorporated into the present contract" (Pl. Ex. 4, pp. 33-34). (Italics ours.)

The language makes it explicit that hourly rates *were* to be calculated and *overtime was to be fixed* with reference to the Fair Labor Standards Act. The weekly figure could not and did not become the subject of *contract* until *after* the Panel recommendation. In fact, the Panel made its recommendation on July 17, 1942, and the Directive Order of the National War Labor Board adopting it was made on July 29, 1942. The agreement in suit was not signed until September 1, 1942. It was signed with a *simultaneous* acceptance of the weekly figure and of the formula hourly rate.

This procedure could have had no meaning unless it meant that the weekly figure (*the only weekly figure ever agreed upon*) was actually intended to include overtime compensation. This conclusion is fortified in various ways: *First*, the formula exactly describes the arithmetical fact that where you have compensation *inclusive* of overtime the way to determine the regular non-overtime hourly rate is by dividing the total compensation by the number of hours employed plus one-half the hours employed above the non-overtime workweek. It is an arithmetical way of saying that the weekly figure *includes* overtime compensation. The employment of the formula makes the intent as clear as if the phrase "inclusive of overtime compensation" had been written in.

*Second*, the Directive Order of the National War Labor Board ordered wage increases on the ground that "they are justified by the rise in the cost of living since January 1, 1941, and by the need to remove the recently

created inequalities between the wage scales in the garment center buildings (the Meyer Agreement) and those here involved"—(Pl. Ex. 4, pp. 3, 16-17, 33-34; 70-72)*. So far as the cost of living increase was concerned that was obviously measured by take home pay. So far as adjustment to the Meyer Agreement was concerned, that agreement already contained the very formula in issue, and hence, was understood in its "weekly wages" to mean "take home pay". The determination of what the employees in our case should get weekly was based on the *knowledge* that the employees under the *Meyer* Agreement were not getting more than that *to take home;*—in simple terms, that the Meyer weekly figure was inclusive of overtime. It is with that concept, then, that the weekly wages awarded by the Board must be compared.

*Third,* the parties understood that the Fair Labor Standards Act applied to their contract. *Kirschbaum* v. *Walling,* 316 U. S. 517 (decided June 1, 1942) and *Overnight Motor Co.* v. *Missel,* 316 U. S. 572 (decided June 8, 1942) had both been decided.** They knew that, if they referred to a weekly figure, they would have to adopt either a weekly rate which would have overtime compensation imposed by the *Missel* formula, or a weekly wage, including overtime.

*Fourth,* the formula itself describes the weekly sum as "weekly *earnings,*" not "weekly rate."

*Fifth,* the Panel of the National War Labor Board and the full Board approved the formula and cannot be presumed to have concurred in an illegal act. The language

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* The Meyer agreement contained the same formula for determining hourly rates, and the minimum weekly figures.

** The Second Circuit Court of Appeals decision in *Fleming* v. *Arsenal Bldg. Corporation,* 125 F. (2d) 278 (C. C. A. 2), decided December 30, 1941, was affirmed in the *Kirschbaum* case. The Fourth Circuit Court of Appeals decision in the *Missel* case, 126 F. (2d) 98, decided January 5, 1942, was affirmed.

of its explanation of the formula in Appendix B to Plaintiffs' Exhibit 4 is poor, but what emerges is that the Panel understood that the weekly figure was intended to be inclusive of overtime compensation under the Act, and that the rate for the non-overtime workweek was as clearly derivable from the formula as if it had been expressed. When the Panel speaks of this method as being in lieu of computation in the "ordinary way" it means precisely what we urge—that the weekly figure was not a "rate" of pay exclusive of overtime and that, therefore, computation in the "ordinary way" was inapplicable.

The Panel statement showed that (1) the parties had known they would adopt the formula *before* they had adopted any weekly figure and (2) that the hourly rate was not to be computed in the "ordinary way"—*because* the weekly figure was intended to include overtime compensation. In that case, the *only* way to determine the hourly non-overtime rate is by the very formula herein inserted.

**B. *The courts below erred in ruling that there was a fixed weekly wage by agreement.***

The District Judge found that "plaintiffs were employed by the defendants at fixed weekly *rates* of compensation" (R. 170; italics ours). From this he concluded that "having fixed a weekly wage by agreement, the determination of the regular rate became 'a matter of mathematical computation, the result of which is unaffected by any designation of a contrary regular rate in the wage contracts.'" He, therefore, ruled that the hourly rate could only be determined under the *Missel* formula (316 U. S. 572): hourly rate equals weekly wages divided by weekly hours (R. 198-199).

His error was pervading, as we shall see, for there was no reference to weekly "rate" in the agreement,

*and there was no competent evidence dehors the agreement to support the finding.* The Second Circuit Court of Appeals affirmed.

If the ruling was one of law, it was wrong because: (1) the only logical inferences from the Agreement, as we have seen, were to the contrary (*supra*, pp. 10-13); (2) it assumed—the very question at issue—that a weekly figure inclusive of overtime compensation could not be the basis for the derivation of an hourly rate even where the number of hours in the workweek was fixed. (See Subpoint C.)

If we treat the ultimate findings (F. F. 15, 18, 19; R. 170-172) as true findings of fact there is no evidence to support them.

*First*, there was no oral testimony whatever on the subject—not one word.*

*Secondly*, the only exhibits, in addition to the agreement itself (Pl. Ex. 1) and the earlier Sloan agreement (Pl. Ex. 3) were two stipulations of fact between counsel (Pl. Ex. 2 and Defs. Ex. B), and the National War Labor Board's Directive Order (Pl. Ex. 4), plus the weekly pay roll records for the period April 20, 1942 to December 10, 1943 (Pl. Ex. 6).**

There is nothing in any of these documents to lend the slightest support to the view that plaintiffs were employed at fixed weekly rates of compensation.

An analysis of the Exhibits shows:

(a) The first stipulation (Pl. Ex. 2) recites:

> 1. That plaintiffs (except for Berger and Rodriguez) "were employed and paid in accordance with

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* The asterisks in the record refer to omitted testimony on entirely different subjects (R. 108-114).

** Pl. Ex. 5 were computations for an earlier period, not relevant in this Court.

> the terms and conditions of employment provided in a collective bargaining agreement known as the N.W.L.B. agreement."

The essence of the agreement was the provision for *hourly* rates to be paid pursuant to the formula. That is the apparent meaning of the stipulation as well, when it speaks of the "terms of employment." In fact, it was stipulated that the employees were actually "employed and paid" under the terms and conditions of the agreement.

If the District Court used "fixed weekly rates" as a word of art, there is no reference to support it in either the agreement or the stipulation.

It was further stipulated:

> "5. That said plaintiffs * * * were employed and actually worked pursuant to the terms of said NWLB agreement during the periods specified below on the following basis:" Then follows a table with these headings: "(1) Plaintiff's name; (2) Period; (3) Total hours regularly employed per week; (4) Weekly wages *or* earnings; (5) Number of regular workweeks in Periods."* (Italics ours.)

The significant heading is "4": "Weekly Wages or Earnings."

This heading can only mean that the parties understood that there was no difference between "wages" and "earnings" and hence, that the weekly figures were "earnings".**

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* Paragraph 5 of Pl. Ex. 2 was amended in Defs. Ex. B, Par. 4 but only as to the figures—not the language or the headings. Def. Ex. B, Par. 7 incidentally refers to the amended figures as "weekly earnings."

** Significantly for the periods *prior* to the National War Labor Board agreement, the heading is simply "weekly wages" (R. 129-132).

(Continued on following page)

If the weekly figure were "earnings", they included compensation for overtime hours.‡

3. Paragraph 10 of Plaintiffs' Exhibit 2 attaches as Exhibit A thereto a typical payroll.

The Court will observe that the payroll showed *hourly* rates with time and one half for all hours above 40.

This is certainly no evidence of a fixed weekly rate of pay.‡‡ On the contrary, it shows an acceptance of the hourly method of payment, with 150% for hours above 40.

(b) The second stipulation (Defs. Ex. B; R. 139-159) deals with actual modes of payment and is no evidence whatever of a fixed weekly rate of pay.

Thus, up to this point, *there is literally no evidence to support the District Court's finding.*

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(~~*Continued from preceding page*~~)

‡ We respectfully ask the Court to note that Paragraph 7 of the stipulation (Pl. Ex. 2, R. 127) applied only to two non-union plaintiffs and has no reference to the other plaintiffs or to the National War Labor Board agreement.

We call to the Court's attention that plaintiffs' counsel has adroitly sought to restate the stipulation *without argument or explanation*, as providing "That each plaintiff received a flat weekly wage for a fixed workweek whose hours substantially exceeded the statutory maximum" (Brief in opposition to certiorari, p. 7). There is no support for such a statement. It is misleading and unwarranted.

‡‡ Respondents rely on certain minor discrepancies found in some items on these payrolls to argue that the hourly rate was not applied. The Circuit Court of Appeals seems to have adopted their reasoning.

The answers are several: (1) The doctrine of *de minimis* was never more applicable, since the bookkeepers simply failed to carry out the hourly rate to four decimals. (2) The laziness or error of particular bookkeepers can hardly determine intention in this vast matter. (3) The errors were not calculated or intentional, for the employers gained nothing from them. (4) The fixing by contract of a weekly figure inclusive of overtime pay, should in any event, be sufficient for compliance, where the workweek is regular.

The only other "evidence" in the record, as we have seen, is the National War Labor Board's Directive Order (Pl. Ex. 4). Attached to the Directive Order is the Recommendation of the Mediation Panel to the National War Labor Board. Attached to the recommendation is an Appendix B. This Appendix B purports to discuss the formula.* In its discussion there are two sentences, picked out by Judge BONDY, and adopted as his findings (F. F. 15, 18, 19; R. 170-172). The same sentences were picked from Judge BONDY's findings by the Circuit Court of Appeals as the basis of its decision. The sentences are: This formula was "designed to offset the full overtime costs which would ensue if hourly rates were computed in the ordinary way"; and its purpose was "to reduce the hourly rate sufficiently so the payment of time and a half for overtime† * * * will not bring the total weekly earnings substantially above the weekly rates set by the agreement" (Opinion of Judge BONDY, R. 197; Opinion of Circuit Court of Appeals, R. p. 83). The last phrase is the only place in the record where we have been able to find the term "weekly rates." It would seem that *on this phrase alone* Judge BONDY based his finding that plaintiffs were employed at "fixed weekly rates of compensation."‡

This we believe was basic error: (a) It overemphasized the specific language of the Panel; (b) it misconstrued what the panel meant, as evidenced by their entire report.

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* As we have seen, *supra* pp. 10-11, there is a clearer statement in the text of the recommendation at pp. 33-34, which the courts below apparently overlooked.

† The District Court here omitted "for the last 6 hours" which was significant language in two respects: (1) it states that overtime was to be paid for *these* 6 hours (from 40 to 46) and (2) it underlines that this was a regular workweek problem.

‡ The District Court could not have based his finding on any determination that hourly rates were not applied for he accepted "the fact that defendants here actually applied in all situations the hourly rates so derived" (R. 200).

(a) The language of the Panel was certainly not binding on the *parties*. They had no part in writing it and it may have entirely misconstrued their intention. It certainly was not binding on the appellants herein who merely adopted the standard contract and were not before the National War Labor Board at all. In the absence of confrontation and cross-examination of its anonymous author the particular nuance of language may have been wholly haphazard. A whole industry may thus be in peril of double liability, with the question left unresolved of whether the anonymous author of Appendix B knew what he was writing in the light of the issue now presented and whether he chose his words with carelessness or caution. Justice can hardly tip the scales with so light a feather.

(b) A clearer expression appears in the language of pages 33 and 34 of the Recommendation of the Panel—(Pl. Ex. 4) quoted above at pages 10-11. It is clear that the Panel was writing of a fixed workweek and when it emphasized the payment of time and a half for overtime *for the last six hours* (Pl. Ex. 4, p. 70) it meant that overtime was actually to be paid for those hours, which were the hours above forty. It is thus manifest that when the Panel spoke of "weekly rates" it did not intend the phrase to be a word of art—but simply to emphasize that the weekly figure was to include overtime compensation as explained by it. If the language of the Panel is "evidence" of an intent to circumvent the statute, it makes the National War Labor Board a party to such "circumvention". There is nothing to indicate it intended or anticipated any such result.

The Panel recommendation, moreover, upon which the lower courts laid such entire stress, antedated the agreement itself. Clear it must be that the meeting of the minds of the parties on the principle of the formula, *i.e.* hourly rates, preceded the award of the Board. The Panel said

so directly (Pl. Ex. 4, pp. 33-34). Clear it is too, that the weekly figure was never agreed on without the formula—for the first possible agreement to the Labor Board's award must have been *after* the Board's Directive Order. By that time, the hourly rate was at least as integral a part of the contract as the weekly figure. What the parties accepted was the weekly figure and the hourly rate *at the same time*. To test the correctness of our conclusion we pose the question: At what point of time was a weekly rate fixed, before inclusion of the formula? We submit there never was any such point of time.

In those circumstances there was no weekly rate of pay agreed to, upon which was superimposed an hourly rate. The weekly figure, in the situation here presented, simply could not mean anything other than "take home pay inclusive of overtime compensation." In those circumstances, the only "regular rates" were constant hourly rates, determined by application of the formula.

This Court said recently:

> "The conclusiveness of the 'finding of fact' depends upon the nature of the materials on which the finding is based. * * * Finding so-called ultimate 'facts' more clearly implies the application of standards of law. And so the 'finding of fact' even if made by two Courts may go beyond the determination that should not be set aside here. Though labelled 'finding of fact' it may involve the very basis on which judgment of fallible evidence may be made."

*Baumgartner* v. *United States*, 322 U. S. 665, 671 (1944); see *Beyer* v. *LeFevre*, 186 U. S. 114, 119 (1901).

We have seen that the "nature of the materials on which the finding is based" in this case is the lowest category of legal proof—a play on words in the Report

of the Panel which does not even carry out its obvious meaning. We have seen that the "foundation for the findings" (322 U. S. at 670) is this "evidence" alone. Nor was there any judgment of the credibility of witnesses by the trial court to which due regard should be given. Indeed, the use of the precise language of the Panel Recommendation to support the finding was nothing more than an exercise in semantics.

We respectfully submit that this is a case where the "foundation for the findings" crumbles on inspection. Even if the fundamental error should be held not to be solely one of law, the error in the findings was that kind of "clear error" upon which, in the interests of justice—and perhaps also because there are so many other defendants who have never had their day in court—this Court should reverse.

***C. Under the decisions of this Court parties may by contract provide that a weekly figure include additional compensation for overtime. In such case, the Missel formula is inapplicable.***

The formula did provide an hourly rate which we are told is unrealistic and artificial because derived from a weekly figure (R. 198-200). That might be so, if the weekly figure were a weekly rate of pay fixed by agreement, regardless of overtime—and for a workweek without fixed hours. For the *Missel* case tells us that, in such case, the regular rate is normally derived by dividing the weekly rate by the number of hours worked. But the *Missel* case did not purport to say that the same result would be reached if the weekly figure, instead of being a weekly rate of pay, were a figure of weekly earnings *inclusive* of overtime pay for a fixed number of hours. For in such case, the figure to be divided by the number

of hours worked *could not,* arithmetically, give a regular rate upon which overtime pay could be imposed without imposing overtime pay on overtime pay.

This Court has not overlooked the logic of the situation. In *Warren-Bradshaw Co.* v. *Hall,* 317 U. S. 88, 93, the Court, in expounding the *Missel* doctrine emphasized the point when it said that in the case there under consideration: "There was no *agreement* providing for an hourly rate of pay *or that the weekly salary include additional compensation for overtime hours.*" (Italics ours.) We take the latter phrase to mean that if there had been such an "agreement" the *Missel* formula would not have applied.

The alternatives thus stated were the alternatives to take the case out of the *Missel* formula. As we have shown, we are covered by both alternatives. Our contract did provide an hourly rate of pay. It also, as we have shown, had the "weekly salary include additional compensation." And the payrolls herein were computed on an hourly basis (Pl. Ex. 6).

That such was the logic of the *Missel* case itself is clear, for the Court there refused to *infer* that the weekly rate of pay was intended to include overtime pay. It refused to mend the contract by "implication." Yet, it would have been unnecessary to rebut the inference had it been irrelevant. In the instant case, the question is, therefore, merely whether the parties to the agreement intended to make the weekly earnings figure inclusive of overtime compensation. (See pp. 10-13, *supra.*)

In the *Missel* case itself the contract *could not* be mended by "implication" because there was no fixed workweek, as here. The Court there said:

> "But there was no contractual limit upon the hours which petitioner could have required respondent to

> work for the agreed wage, * * * and no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wage" (316 U. S. at 581).*

We submit that the emphasis in the *Missel* case on the fact that there was no contractual limit upon the hours to be worked for the agreed wage means that when there is a regular workweek with fixed hours, there may be a weekly figure that *does* include overtime. The language in *Warren-Bradshaw*, quoted *supra*—"or that the weekly salary include additional compensation" (317 U. S. at 93), confirms this view.

It is unnecessary, therefore, to rely upon *Walling* v. *Belo Corp.*, 316 U. S. 624 (1942) although that case supports affirmance in this case. Our case is *a fortiori* to the *Belo* case. For there the weekly income was guaranteed regardless of the number of hours worked up to 54½ hours per week. In the case at bar the weekly wage was not guaranteed and the fixed hourly rate would bring fluctuations in weekly earnings if the employee worked less or more than 46 hours. The *Belo* case clearly supports the proposition that a contract which provides both a weekly wage and an hourly rate need not be illegal because of inconsistency. It may be noted that the dissent in the *Belo* case relied strongly on the argument that the *Belo* contracts were "for weekly wages for variable

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* This is a clear point of distinction from a case like *Walling* v. *Stone*, 131 F. (2d) 461 (C. C. A. 7, 1942). There the employment was at fixed weekly wages "irrespective of the hours worked" (131 F. (2d) at 462). The Court was, therefore, clearly right, on the facts before it. If the decision meant that in no circumstances could there be an agreement for a wage to include statutory overtime pay, it is contrary to the language of *Warren-Bradshaw Co.* v. *Hall*, *supra*.

hours" (316 U. S. at 637). There is no such difficulty in our case.

Three other cases, in addition to the *Missel* case are cited to support the decision below: *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, *Walling* v. *Hardwood Co.*, 325 U. S. 419, and *Walling* v. *Helmerich & Payne*, 323 U. S. 37.

(1) In the *Harnischfeger* case, 98.5% of the incentive employees received incentive bonuses in addition to their guaranteed hourly wages, demonstrating that such bonuses were a normal and regular part of their income. The court held that the parties could not disregard the total earnings *within the statutory workweek* in computing the regular hourly rate. The true wages were held to include the incentive bonuses.

(2) In the *Hardwood* case the same doctrine was applied, except there the guaranteed piece goods rate was the real rate. In our case, we have no problem of incentive bonuses or piece work rates.

(3) The *Helmerich & Payne* case seems more difficult because of some of the language in the opinion. But upon analysis it is no precedent for affirmance.

First, there was a clear intention to perpetuate the "pre-statutory wage scale".* Indeed, this court described that as the "sole purpose" of the plan (323 U. S. at 41). The

* The Court below in the *Helmerich & Payne* case (138 F. (2d) 705, 706 (C. C. A. 10, 1943)), said: "The company concedes that the real purpose in entering into the contracts was to continue paying the employees the *same amounts per week* in the aggregate as they had been paid before the act became effective, and at the same time to comply with the act." (Italics ours.)

wages under the old system and under the split-day plan were *identical* (323 U. S. at 39). The plan was created in order to maintain the *same* wage levels after the Act became effective (323 U. S. at p. 38). In the case at bar, there was no attempt to perpetuate the pre-statutory wage scale. The take home pay under our contract was higher than the take home pay under the preceding Sloan agreement. (See Subpoint E, pp. 30-33, *infra.*)*

Second, there was an arbitrary division of each workday to accomplish the purpose so that the expressed hourly rate failed to reflect the first 40 hours of work ("the normal, non-overtime week") as required under the Act.

Third, there was no fixed workweek and the hourly rate was so constructed that on the basis of a 12-hour day there could be no extra compensation except after 84 hours.

Fourth, there was no provision, such as here for including overtime in a fixed weekly figure for a regular workweek.

We believe that there has been no case in this Court which has determined the precise problem of a *regular* workweek, where by contract the parties intend to provide for overtime to be included in a weekly figure.

We respectfully submit that there is nothing in the Fair Labor Standards Act or in the realities of the collective bargaining situation to prohibit the fixing of weekly compensation to include overtime, where a regular workweek is stipulated.

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* We recognize that in *Watkins* v. *Hudson Coal Co.*, 151 F. (2d) 311 (C. C. A. 3, 1945), cert. den. 327 U. S. 777 (on another point) there was an increase in pay which appears not to have been considered relevant. With deference, we think the Third Circuit Court of Appeals failed to consider how anomalous is a doctrine which conceding that an increase has been agreed upon beyond the penalty requirements of the Fair Labor Standards Act, nevertheless condemns a rate based thereon as artificial.

As with all methods of compliance with the Fair Labor Standards Act the courts will look to the realities. If there was a weekly rate of pay agreed upon, exclusive of overtime with no fixed hours, the addition of a formula might not be enough to prevent the application of the *Missel* doctrine. But where the parties bargain throughout for a fixed workweek with the formula in mind, there is at no point of time a contract for a weekly rate exclusive of overtime; the *original* contract includes the overtime compensation in the weekly figure. And that is just what this Court has intimated would be valid. (Cf. *Warren-Bradshaw Co.* v. *Hall, supra; Overnight Motor Co.* v. *Missel, supra*).

To be sure, the use of a weekly figure to include overtime compensation, might, in certain cases, offend the spirit of the statute. That might be so where the purpose is to preserve the prestatutory wage scale and maintain the same *take home wage.* In the light of the *Helmerich & Payne* case (*supra,* p. 23) we assume that the rationale of that decision would permit the court to determine whether the purpose was to perpetuate the pre-statutory wage scale.

In the case at bar, there are no such obstacles.

First, there was no attempt here to perpetuate the prestatutory wage scale, for the new contract involved substantial increases over the old contract.

Second, the agreement was made with a strong, *bona fide* labor union which presumptively takes care of its members and does not lightly waive their rights. The presumption is that the union officials understood that the agreement was not a subterfuge to circumvent the statute.*

* We recognize that the mere fact that the agreement was the result of collective bargaining is not enough to save it if it is not in compliance with the Act. But where *intention* is involved, as here, the *bona fides* of the labor union cannot lightly be disregarded.

Third, the contract, in all its terms, was approved in advance by the National War Labor Board. Presumptively, a government agency would not approve a contract intended to circumvent a federal statute. See *United States* v. *Crusell*, 14 Wall. 1, 4 (1871); see *Evans* v. *Berry*, 262 N. Y. 61, 72 (1933).

By every canon of judgment, we submit the National War Labor Board agreement meets the test of good faith. For the parties could have reached precisely the same result by expressing the hourly rate instead of using the formula. That was apparently not done for two reasons: (1) the industry was not accustomed to dealing in hourly rates and a specific hourly rate would have had little meaning for the employees; and (2) there were so many categories of employees that long schedules of hourly rates would have been required. This was particularly true because compensation varied by seniority in individual buildings, and a properly expressed hourly rate would have required hundreds of separate calculations. The problem was not the usual one of flat rates for large categories of employees in industrial plants. It is for this reason that the weekly compensation had to be stated in terms of "minimum wages" (inclusive of overtime pay).

**D. *The formula hourly rate is not different in law from an expressed hourly rate. The reasoning of the Circuit Court of Appeals leads to unrealistic distinctions.***

In the absence of the language of the Panel Recommendation, the Circuit Court of Appeals intimated that the formula method of computing an hourly rate might be as valid as an hourly rate "expressly stated."

We suggest that is clear. Practical considerations make it evident. To distinguish between an hourly rate expressed and an hourly rate derived, provided it is not

artificial, would be to put form above substance. In industries where before the statute a *weekly* rate was prevalent, the fixing of a regular hourly rate is often difficult because neither side is accustomed to think in those terms. Where in such industries there is the complicating factor of a workweek longer than the statutory workweek the factor of "take home pay" becomes, in realistic terms important. For whether the rate is, as an initial matter, fixed at an hourly rate or at a weekly rate, the figures will often not result in the take home pay the employees desire unless they are given work for more than 40 hours. Yet, unless there is a regular workweek of more than 40 hours defined in the contract there is no way of assuring to the workers the take home pay they want.*

This brings us to a practical dilemma. The employee wants to know how much he will take home in his pay envelope each week. That is the primary concern of the union representative. If he can get a high enough rate for 40 hours of work, there is no problem, to be sure. But if by collective bargaining, which is give and take, he *cannot* obtain a high enough rate for 40 hours he must bargain for a regular workweek that will insure sufficient take home pay. When they get to that stage of negotiation, the parties will, in practice, determine an hourly rate by contract which will, with time and a half superimposed by the Fair Labor Standards Act, give a take home pay sufficiently large. In realistic terms, the parties bargain backwards in such case. Each side will have

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* That this was the concern of the union here is made clear by the provisions of the contract that the regular working hours may not be reduced by the employer in order to effect a corresponding reduction in pay. Naturally, the union desideratum was a 40 hour week with high enough take home pay. But if that is not possible of attainment, as was the case here under the NWLB award, then the union must protect the take home pay even to the point of insisting on longer hours.

a scratch pad on which he will note the take home pay figure and figure back to an hourly rate, with time and a half superimposed. To say they should not do this would be to interdict the normal procedures of men at a bargaining table. It would be much like telling a business man that he can figure only gross profit but that he may not legally compute his net.

Assuming then that an hourly rate is thus arrived at by the scratch pad device *before the contract is agreed upon,* the hourly rate will become the contract rate and clearly be in compliance with the Act, if time and one half is paid upon it for hours above 40.

Suppose now the parties, with the same end in view, articulate their arithmetical results by marking the process, not on scratch pads hidden from each other's view, but on the tablet that becomes the contract. The net result should be the same.

That is what the parties did here, perhaps in a naive belief that open expression can be no less dangerous than clandestine mathematical computation. And that is what the Circuit Court of Appeals seems to have thought illegal.‡

The Circuit Court of Appeals concluded that "the result was employment at whatever regular workweek and at whatever regular weekly wage the parties saw fit to agree upon *which remained constant* regardless of work in excess of forty hours per week which was not in excess of the number of hours in the agreed workweek" (R. p. 83). (Italics ours.)

There is no showing in this record that an employee working under forty-six hours would receive the weekly

‡ The C. C. A. indeed seemed to acknowledge that there was no difference between an expressly stated hourly rate and the formula rate (R. p. 83): "In the absence of any attempt to circumvent the statute we might agree."

wage referred to in the contract. The formula is to the contrary, for it fixed a specific hourly rate which would result in less earnings than the weekly wage of the contract if hours between forty and forty-six were worked.

The Court then characterizes the effect of the present contract as "an illusion of overtime pay after a forty hour workweek where there can be no increase in pay per workweek because of overtime work unless there is overtime not only in excess of the statutory workweek but also in excess of the agreed workweek". This again repeats the erroneous assumption that no overtime pay based on an hourly rate would be paid for hours above forty. That is not supported in the record.

But if the vice lay in the fact that normally the employee would work forty-six hours and receive the same amount each week, then the reasoning of the court below is unrealistic. For, by the laws of arithmetic, the total wage, including overtime compensation, will always "remain constant" when the same number of hours is worked regularly. Thus, if there is a regular 46-hour week, the total wage will "remain constant" each week, whether the regular rate be an expressed hourly rate, a derived hourly rate, or an hourly rate determined by the *Missel* formula. Indeed, if the 46 hours are worked each week, the same result will follow whether the length of the workweek is expressed in the contract or not.

And since it is clear that the Fair Labor Standards Act does not prohibit a workweek longer than the statutory workweek, the Circuit Court of Appeals could hardly have meant that, in no case, could a regular workweek longer than the statutory workweek be fixed. If a workweek longer than the statutory workweek can be agreed upon by employer and employee, must it take any particular form? If we assume an agreement for a forty-six hour week and an intention to comply with the Act, an expressed hourly rate would certainly be valid, for, by

hypothesis, it would refer only to the statutory workweek, and be automatically increased by 50% for all hours above forty. Indeed, the Circuit Court of Appeals assumed its validity, *even though a workweek in excess of the statutory workweek was fixed,* as here, when it said "In the absence of any attempt to circumvent the statute we might agree" (R. p. 83).

If then, the expressed hourly rate, is, in such circumstances valid, why should the formula hourly rate not be? As we have seen, the circumstance that the result would "remain constant" in the case of a regular workweek, is no bar, for that would be just as true of the expressed hourly rate.

The upshot is: there can be no objection to the formula hourly rate except on the assumption that the weekly figure was a weekly rate of pay, exclusive of overtime pay—and with no fixed hours. If, as we have demonstrated with almost mathematical precision, there never was a weekly rate exclusive of overtime pay in this agreement,—and since the hours were fixed—there can be nothing vicious about the formula hourly rate. It must be as valid as an expressed hourly rate—and it will award overtime compensation for all hours above the statutory workweek the same as an expressed hourly rate.

***E. The take home pay is higher under the National War Labor Board contract than the take home pay under the preceding Sloan agreement, even with the additional compensation required by the Fair Labor Standards Act under the Sloan agreement. The employers have already been penalized more than the 150% for hours above the statutory workweek. In these circumstances, the statutory policy has been fully complied with.***

(1) *In terms of take home pay* (the ultimate objective of the Fair Labor Standards Act):

The Sloan agreement (Pl. Ex. 3) preceded the National War Labor Board contract. It was signed on July 7, 1939,

before the Fair Labor Standards Act had been held to apply to building service employees (*Kirschbaum* v. *Walling*, 316 U. S. 517, decided June 1, 1942). It provided for flat weekly wages for workweeks longer than the statutory workweek. The relevant test of intent "to negate the statutory purpose" (*Cf. Walling* v. *Helmerich & Payne*, 323 U. S. 37, *supra* at p. 18) would be an arrangement under which the total wage, including overtime compensation, would perpetuate the old total wage. There was no such subterfuge in this case.

This is demonstrated by the following comparison on a weekly basis of the take home pay applicable to loft buildings under the Sloan Agreement and under the National War Labor Board contract (Pl. Ex. 3; Pl. Ex. 4, p. 31):

TABLE 1

| | *Sloan Agreement* | | | *NWLB Agreement* | | |
|---|---|---|---|---|---|---|
| | *"A" Bldgs.* | *"B" Bldgs.* | *"C" Bldgs.* | *"A" Bldgs.* | *"B" Bldgs.* | *"C" Bldgs.* |
| Elevator Starters | $29.75 | $27.75 | $26.00 | $33.08 | $31.15 | $28.50 |
| Assist. Elevator Starters | 28.00 | 26.75 | 26.00 | 31.33 | 30.15 | 28.50 |
| Handymen | 31.00 | 28.00 | 27.00 | 34.33 | 31.40 | 29.50 |
| Other Employees | 27.75 | 25.75 | 25.00 | 31.08 | 29.15 | 27.50 |

(2) *Applying the Fair Labor Standards Act to the Sloan Agreement:* To arrive at a comparable figure under the Sloan agreement, *with the Fair Labor Standards Act applied thereto,* reduce the flat weekly wage by 1/47, to allow for the reduction of one hour per week, and then apply the overtime premium for the last 6 hours on the basis of a 46-hour week:

TABLE 2

| | *Sloan Agreement* | | | *National War Labor Board Agreement* | | |
|---|---|---|---|---|---|---|
| | *"A" Bldgs.* | *"B" Bldgs.* | *"C" Bldgs.* | *"A" Bldgs.* | *"B" Bldgs.* | *"C" Bldgs.* |
| Elevator Starters | 31.01 | 28.93 | 27.11 | 33.08 | 31.15 | 28.50 |
| Assistant Elevator Starters | 29.19 | 27.78 | 27.11 | 31.33 | 30.15 | 28.50 |
| Handymen | 32.28 | 29.19 | 28.15 | 34.33 | 31.40 | 29.50 |
| Other Employees | 28.93 | 26.84 | 26.06 | 31.08 | 29.15 | 27.50 |

Thus, the percentage of increase required under the Fair Labor Standards Act as applied to the Sloan agreement was slightly over four per cent.* In fact, the increases in take home pay under the National War Labor Board agreement *actually* ranged from 10 to 13% in "A" and "B" buildings to 9 to 10% in "C" buildings.**

By any test, the actual wages paid penalized the employers *more* than the 150% for overtime hours required by the statute. The question that remains is extremely narrow. Does the form of this contract so far vitiate the substance that despite the realities of the situation the employers must, nevertheless, again be penalized—and at this time with the addition of liquidated damages and counsel fees?

We cannot help respectfully noting that the Circuit Court of Appeals may have inadvertently misstated the facts in this regard. It wrote:

> "In making the employment contract of September 1, 1942 the parties did not see fit to agree upon the

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* These percentages may be computed by comparison of Table 1 with Table 2, Sloan agreement figures throughout.

** These percentages are based on actual take home pay increases in Table 1.

basis of a designated regular hourly rate of pay for a statutory workweek expressed simply in dollars or cents, but retained the previous workweek in excess of forty hours *and the previous weekly wage which the appellees had been paid* * * *" (R. p. 82) (Italics ours.)

It is possible that the Circuit Court of Appeals was there assuming that the weekly wage *had not been increased.* If that was its meaning, it erred on the fact. It may, therefore, have failed to consider the reality of the situation, that the employer had already been penalized more than the 150% required by the agreed increase in "take-home pay."

***F. Realism requires that the agreement formula herein be sustained. Otherwise, collective bargaining will be hampered. No statutory purpose supports affirmance in this case.***

Since the employers here paid more than the statutory premium, the only consideration that can be raised against them is an objection of form rather than substance. For it will be freely conceded that if the form of the contract had been different there could have been no complaint as to the result. To put it bluntly: if part of the increase given had been more clearly marked as the beneficent result of the statute rather than of the activity of the union, all would have been well. Respondents' complaint, as we understood their argument below, is that the union might have obtained more if it had clearly marked the delineation of statute and bargaining. But that is an assumption contrary to the facts. For it was the National War Labor Board that determined the amount of the award, and that agency considered the application of the Fair Labor Standards Act in its determination. If what respondents mean is that a clearer demarcation would have meant refusal of

the award by the rank and file—a strike—they have merely pointed up the argument of policy.*

The danger of a strike in vertical transportation in New York City by elevator operators in loft buildings is always a serious matter for the entire nation. In wartime such a strike would have been disastrous. Both parties to the dispute commendably agreed to the compromise increase in take home pay—under the Directive Order of the National War Labor Board. To prohibit such procedures in collective bargaining by narrow construction of the Fair Labor Standards Act would be to limit the field of compromise. The employees in this case received a fair increase in take home pay, after full consideration by their representatives of the impact of the Fair Labor Standards Act upon their industry, under the then recent rulings by this court that these employees were in interstate commerce. If economically, all there was in the picture was a limited increase (as the National War Labor Board found),—to compel part of that increase to be ascribed solely to the operations of the Fair Labor Standards Act and not to union activity would be to harm the union in its maintenance of membership and render a disservice to the cause of collective bargaining. Union representatives sometimes need the gift of statesmanship as well as of hard bargaining. It does the policy of the collective bargaining statutes no good to limit the field of action of union representatives with reference to the Fair Labor Standards Act. We have previously touched on the problem of ensuring take home pay as a prime union consideration. In addition, the good faith of the bargaining process is seriously jeopardized when latent technical objections are validated although the contract has been accepted, in good faith, by all concerned as the final word of the bargain and as full compliance with the Act.

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* Respondents are guessing, of course, when they imply now what the union members might have done then. There is nothing in the record to support any such inference—or that the moneys now claimed are anything but a windfall.

## CONCLUSION

**THE JUDGMENT OF THE COURT BELOW SHOULD BE REVERSED.**

Respectfully submitted,

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